JOINDER OF CLAIMS UNDER ALTERNATE AMBIGUITIES.

AMBIGUOUS gifts in wills are treated with very scant courtesy by the English courts. Unless the ambiguity can be removed by extrinsic evidence, the gift fails to take effect; the principle being that an unambiguous disposition is necessary to defend the title of the heir at law, next of kin, residuary devisee or legatee, or person entitled in default of appointment. There are many cases, however, in which the ambiguity is very limited in extent. It may be twofold, threefold, or manifold, but it is quite clear that the testator meant one of a definite number of persons, things, or events. At first sight it would seem that if it were possible to join the claims under these ambiguities, an unanswerable dilemma, trilemma, or polylemma would be presented to the court. It is, therefore, necessary to inquire on what principle the court acts in refusing to allow such a joinder. Such dilemmas are treated with the same severity as the ox too wont to push with his horn in the days of Moses. Why is this?

The lawyer's answer is quite ready. An ambiguity is a mere zero or cipher, *i. e.* nothing at all; and no number of ciphers can amount to the unity which represents a complete gift. This answer, if accepted, completely disposes of the question. But might not a layman of average intelligence, coming fresh from Lord Esher's Farewell to the Forum, deeply imbued with the idea that law is after all the quintessence of common sense and logic combined, put the case in some such way as this? "An ambiguity is not necessarily a cipher. It is either a cipher or unity; and in that ambiguous condition it is no doubt ineffectual as against the heir or next of kin. But the sum of all possible ambiguities amounts to unity; and if they are all represented by claimants who are *sui juris* and can join their claims, why should not effect be given to the unity thus obtained? In that way the testator's intention would be far more nearly carried out than by the present practice, which is really illogical. Suppose there are three possible ambiguities, x, y, z, which are mutually exclusive.

Then the value of each is '0' or '1,' and the true logical equations are as follows: —

$$x + y + z = 1 \qquad (1)$$
$$xy = 0 \qquad (2)$$
$$yz = 0 \qquad (3)$$
$$zx = 0 \qquad (4)$$

The lawyer practically refuses to acknowledge equation (1). If he writes anything, it is

$$x + y + z = 0,$$

urging that as x, y, and z must each be deemed to be zero, unless they are proved to be unity, therefore

$$x + y + z = 0."$$

To such a layman the lawyer's answer might indeed seem good law, but hopeless logic. This is a Law Review, but it may nevertheless prove not uninteresting to examine one or two typical cases from this Philistine standpoint.

Take, for instance, the case of the ambiguous devisee or legatee. A testator gives his residue to "my nephew Jones." He has two and only two nephews named Jones, viz., Richard Jones and William Jones, both *sui juris*, and it is quite certain that he meant one of them; but, no evidence being forthcoming, it is impossible to ascertain which. Would it not be reasonable to allow Richard and William to join their claims and divide the property as they wished? It is not quite clear whether any such joinder was attempted in Stephenson, *In re*, Donaldson *v.* Bamber.[1] Probably the law that an ambiguity counts as zero was too well accepted, but it certainly defeated the testator's intention *in toto*, whereas a joinder of the claims would have defeated it only *pro tanto*. Even if some of the claimants were infants, the court might well sanction a compromise joining their claims, rather than let the whole property go to the heir, next of kin, or other persons whom the testator clearly intended to dispossess. To this small extent a leaning against intestacy would surely be permissible.

Next take the case of the ambiguous devise or legacy. A testator seised of four freehold houses in Sudely Place leaves No. — Sudely Place to A, No. — Sudely Place to B, No. — Sudely Place to C, and No. — Sudely Place to D, the numbers of the houses being omitted. It will be noticed that the testator has not given "a

[1] 66 L. J. Ch. 93; [1897] 1 Ch. 75.

house," but "a specific house" in each case, so that selection by the devisees is out of the question. The testator has himself made the selection. What has he selected? The lawyer answers, "Nothing;" and the four houses, unfortunately unnumbered at the date of the will, will go to the heir at law, however friendly and eager to pool their claims A, B, C, and D may be.

In Asten *v.* Asten,[1] one of the devisees was the heir at law, and he of course claimed all the houses. The claims of the other devisees would not have amounted to unity, if joined, so no attempt was made to join them. But it is fairly certain, as the law stands, that if the heir at law had been a different person altogether, the four devisees could not have combined against him. And yet those four devisees would have represented every one of the twenty-four possible allocations of the four houses. The curious thing is that claimants entitled under the various possible constructions of a will are entitled to join their claims and ask for a declaration of intestacy as against the heir or next of kin, without troubling the court to construe the will as between themselves in the first instance. That may be left for a future occasion, when the claimants under an intestacy are out of the way. This course is allowed because it is perhaps somewhat too hastily assumed that the court could construe the will if it tried. For instance, in Forester, *In re*, Jervis *v.* Forester,[2] a testatrix left her residue for such charitable purposes as she should by codicil appoint, and by codicil directed that it should be paid to The Forester Charity Trustees, to be applied for the purposes of a cottage hospital and a convalescent home, the sites to cost £2,000 and £5,000, and the building and furnishing £10,000 and £30,000 respectively. The residue, being about half a million, was largely in excess of the most extravagant requirements of a hospital and home built on such a small scale. The Forester Trustees and the Attorney-General joined forces against the next of kin, and successfully contended that there was a general dedication to charity, and no intestacy, as indeed was tolerably obvious. The actual destination of the surplus funds is still *sub judice*, and no doubt capable of decision if necessary; but it was a distinct advantage to get rid of the next of kin at as early a stage as possible. A case in which the court has said that on a careful consideration of the

[1] 63 L. J. Ch. 838; [1894] 3 Ch. 260.
[2] 13 Times Law Reports, 555.

whole will, and after referring to the usual bead-roll of more or less relevant authorities, it is unable to decide in favor of either of two equally balanced constructions, has yet to be reported. It is almost certain that no such case can have occurred during the seventy-five years' life of the Law Journal Reports without express attention being drawn to it. So, again, no doubt the triplets Fortunatus, Stephanus, and Achaicus, referred to in Stephen on Evidence, article 31, might have joined in an ejectment as heir at law of their father if their relatives had been less careful to distinguish which was the eldest. The law would have allowed that course, because clearly the legal estate would have been actually vested in one of them. But apparently a devise to the father's heir at law would have been ineffectual apart from the armstring, declaration, and reference to 1 Cor. xvi. 17.

Another group of cases may be called "the ambiguous event." Property is given in one event to A and in another event to B. One of the events must have happened, but it is impossible to ascertain which. In former days A and B could not have clubbed their rights together and said that one or other of them was entitled; and if they had both conveyed their rights to a third person he would probably have been no better off. In Wing *v.* Angrave (1860),[1] a wife executed a general testamentary power of appointment over certain property in favor of her husband, and in the event of his death in her lifetime to Wing absolutely. On the other hand, the husband bequeathed his property in trust for his wife absolutely, and in the event of her death in his lifetime upon trust for Wing absolutely. Both the appointment and bequest were subject to trusts for children, which failed. The husband and wife went down in the same ship, and the question arose, who was entitled to the property appointed by the wife. It was admitted that if Wing had been entitled to that property for his own use absolutely in either event, he might have taken it. If, for instance, the appointment had been in one event to Wing, in the other to the person who was Lord Mayor of London at the death of the appointer, then if Wing had happened to be Lord Mayor at that time he would have been entitled *quâcunque viâ*, and his title would have been good. In that case it would have been certain that in every possible event Wing was entitled for his own use and benefit. But in the actual case Wing claimed

[1] 30 L. J. Ch. 65; 8 H. L. C. 183.

the property either as appointee of the wife if she survived, or as executor and residuary legatee of the husband if he survived, subject to paying his debts; and these two distinct and inconsistent rights were held incapable of joinder. To a layman, again, it would seem so natural for Wing to have offered to take the half loaf and pay the husband's debts and legacies in either event out of the property. But in 1860 he was not allowed to do so. His two claims could no more be joined in those days than if they had been vested in separate persons. Such a joinder was then considered champertous, contrary to policy, and obnoxious to the statute against buying or selling pretensed titles.[1]

At the present day the rules of court allow both the joinder of plaintiffs and the joinder of alternative causes of action, so that the difficulty of the ambiguous event might perhaps be got over. But the ambiguous devisee or legatee and the ambiguous devise or legacy are still in a parlous state, and, it may be, receive at times somewhat less than natural justice. The examination student who regards the heir at law with a veneration little short of feudal would probably not waste much sympathy upon such unsubstantialities. Hawkins, Jarman, and Theobald supply ready and convenient answers to all such questions; and lay criticism is not likely to commend itself to a legal examiner. But the happier student, who has laid aside his straight-waistcoat, and can think a little for himself, might not unprofitably spend an hour or so in satisfactorily exposing the sophistries of that quibbling layman, and relegating him and his mare's-nest to their normal obscurity.

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[1] 32 Henry VIII., c. 9. *Vide* Cholmondeley *v.* Clinton, 2 J. & W. 1, 136; Tur. & R. 107, 116; 4 Bligh, 1, 43, 81, 90, 123.